



Trial All Courts  
All Legal Matters

Law Office of

**Kathryn M. Swisher**

Attorney At Law  
Suite 777

The Pelabole Building  
699 S. Mendenhall Rd. at Poplar  
Memphis, Tennessee 38117

ORIGINAL  
FILE

Telephone:  
682-6320  
Area Code 901

RECEIVED

SEP 2 1992

MAIL BRANCH

RECEIVED

SEP - 2 1992

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Sept. 1, 1992

Federal Communications Commission  
The Secretary  
1919 M. Street, N.W., Room 222-Stop Code 1170  
Washington, DC 20554

RE: In the Matter of BROWN COMMUNICATIONS  
MM Docket No. 92-35

Dear Sirs:

Enclosed please find an original and six (6) copies of Brown Communications Proposed Findings of Fact and Conclusions of Law for the above referenced cause (MM Docket No. 92-35), as directed to Honorable Richard Sippel, Administrative Law Judge.

Should any additional information be required, please contact this office.

Respectfully yours,  
Law Office of  
Kathryn M. Swisher

Kathryn M. Swisher  
Enc.

cc: Paulette Laden, Attorney for Mass Media Bureau  
Judge Richard L. Sippel, Administrative Law Judge

*P.S. Also, see enclosed official address change.*

No. of Copies rec'd  
List A B C D E

0+6

RECEIVED

SEP 2 1992

MAIL BRANCH

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C.

RECEIVED

SEP - 2 1992

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re:

BROWN COMMUNICATIONS  
Licensee of Radio Station  
WKIJ (AM)  
Parrish, Alabama

MM DOCKET NO. 92-35

To: Administrative Law Judge  
Richard L. Sippel

PROPOSED  
FINDINGS OF FACT  
AND CONCLUSIONS OF LAW  
OF BROWN COMMUNICATIONS

Kathryn M. Swisher

Law offices of  
Kathryn M. Swisher  
699 S. Mendenhall Road  
Memphis, Tn 38117  
(901) 682-6320

Counsel for  
BROWN COMMUNICATIONS  
Parrish, Alabama

September 1, 1992

RECEIVED

SEP 2 1992

MAIL BRANCH

PROPOSED

FINDINGS OF FACT

AND CONCLUSIONS OF LAW

OF BROWN COMMUNICATIONS

RECEIVED

SEP - 2 1992

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

BROWN COMMUNICATIONS, by counsel, hereby respectfully submits its Proposed Findings of Fact and Conclusions of Law in the Order to show Cause why the License for Station WKIJ(AM), Parrish, Alabama, Should Not be Revoked proceeding. In support thereof the following is submitted:

I. INTRODUCTION

1. This case was initially designated for hearing by the Mass Media Bureau pursuant to Order to Show Cause and Hearing Designation Order, FCC 92-85 released March 26, 1992 ("HDO").

2. The HDO designated for hearing (a) the license held by Brown Communication ("Brown") for Station WKIJ(AM)), Parish, Alabama, and (b) the results of an investigation into WKIJ(AM)'s silent status.

3. The following issues were designated for hearing in the HDO:

1. To determine whether Brown has violated sections 73.1740 and/or 73.1750 of the Commission's Rules.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Brown is qualified to be and remain the licensee of Station WKIJ(AM).

By Order, FCC 92 M-398, released March 31, 1992, the Chief Administrative Law Judge assigned the case to Administrative Law Judge Richard L. Sippel.

3. On May 21, 1992, by Order, FCC 92M-413, Released April 1, 1992 a preconference Status Report was held.

4. Pursuant to the Presiding Judge's Prehearing and Trial Order, FCC 92M-413, released April 1, 1992, the Mass media bureau submitted its status report as follows:

1. The Bureau counsel participated in a number of telephone conversations with Jimmy Brown, principal of ("Brown"). Based on the conversations the Bureau believed that Brown intended to contest the revocation of the lincense for WKIJ(AM).

2. The bureau is unable to take a position at this time as to whether a forfeiture is appropriate and, if so, in what amount. As the Prehearing and Trial Order points out, that matter is dependent upon the circumstances of the case. The bureau's theory of the case is set forth in its Bill of Particulars, served April 16, 1992. However, the license has the right to present its own evidence with respect to the relevant circumstances. Prior to the presentation of the licensee's case, it would be premature for the Bureau to recommend sanctions.

5. The hearing commenced on June 29, 1992 and lasted until 3:02 p.m. at which time the record was closed. Tr. 256.

### II. FINDINGS OF FACT

6. Under Section 1.91(d) of the Commission's rules, the Commission and in the Commission's stead, the Mass Media Bureau by delegation, has the burden of proceeding with the burden of proof. Tr. 77.

7. Paulette Laden was identified as Bureau Counsel. Tr. 77.

8. Jimmy D. Brown represented ("Brown") and appeared pro se. Tr. 77-78.

9. Exhibits MMB No. 1 through 16 were entered into evidence by the Bureau. Tr. 83-98.

10. ("Brown") received mail from the FCC.

Tr. 125-127.

11. ("Brown") first called Ms. Bradfield on 4-10-92 to ask her about the license being revoked. Tr. 140.

12. The way ("Brown") heard that his license would be revoked was through a consultant engineering firm's employee that there was a list of ten radio stations to have their licenses revoked, and WKIJ was one of them. Tr. 143.

13. In May of 1992 a lady from the FCC called ("Brown") and asked him why he hadn't sent her an ownership statement. ("Brown") advised her that he hadn't received one. She sent him a copy; he filled it out and returned it to the Commission. Tr. 168.

14. MMB Exhibit No. 9 is the same as " ("Brown's") page 2 to his Exhibit 6, Letter dated August 29, 1991 Tr. 175, 177. This letter was addressed to Jimmy D. Brown, Brown

Communications; Route 10, Pittsburgh, Pennsylvania. Tr. 176.  
"Brown" did not receive that letter and only became aware of it in MMB's request for admissions. Tr. 178.

15. ("Brown") did not receive page 3 and 4 to his Exhibit 6, a letter dated June 24, 1991, sent to 314 Highway 78 By-Pass, Jasper, Alabama Tr. 178-179. ("Brown") had no explanation why he did not receive that letter. Tr. 180. This was the same as MMB Exhibit No. 10. Tr. 180-181.

16. On December 5, 1988 the official mailing address for the broadcast station WKIJ was given as 314 Highway 78 By-Pass, Jasper, Alabama, 35501. Tr. 185.

17. On April 27, 1992 the official mailing address for the broadcast station WKIJ was given as 4002 McIngvale Road, Hernando, Mississippi, 38632. Tr. 186.

18. No other change of address cards were sent to the Commission. Tr. 186.

19. The Commission sent ("Brown") an emergency Broadcast system authentic word to be used in emergency cases each quarter of the year for January, February, March., 1992. Tr. 133-4.

#### UNAVOIDABLE LOSS OF A TRANSMITTER SITE

20. ("Brown's") antenna was moved in the fall of 1991 to put a tower up for field strength measurements. Tr. 191. ("Brown") was looking to increase the power. Tr. 192.

21. ("Brown") had authority from the Commission. Tr. 192.

22. ("Brown") paid one hundred dollars to the Commission to start the process. Tr. 193.

23. The lease for the prior location to the property was cancelled primarily because there was a hardship on the family who owned the property. Tr. 193-4.

24. The property where the antenna is presently located is owned by ("Brown"). Tr. 194.

25. Exhibits 1-9 were introduced by ("Brown"). Tr. - 201.

26. ("Brown") went silent since January 21, 1992 Tr. 198, 206.

27. ("Brown") did not know that there was a problem with the Commission concerning his silence until he was advised by Mr. Frost sometime before March 26, 1992 when he was served the order to show cause. Tr. 202-5.

28. ("Brown") immediately contacted the Commission to find out why the license was to be revoked. Tr. 204.

29. Mr. Frost and a couple of other businessmen wanted to barter the time from ("Brown") of the station. They wanted to program it Christian programming. They were trying to get the station on the air. Tr. 206.

#### AUTHORIZED AUTHORIZATIONS

30. ("Brown") had been communicating with the Commission. No one told him that he was off without authority. Tr. 207. If he had known he would have asked for an extension. It wouldn't have taken ("Brown") 30 minutes or half a day to gather the information to send back

to the Commission to satisfy their needs. Tr. 208.

31. ("Brown") lacks a few documents which would take about a week to be able to proceed in terms of getting authorization from the Commission to increase his power. Tr.

#### MITIGATION OF DAMAGES

32. The documents he lacked were a contours map, a plot to show where the signal goes, the aerial curve cover, a contour overlay and another document showing that it won't interfere with the other stations that are on 1130. These three documents need to be prepared by an engineer. Tr. 209.

33. ("Brown") had been preparing those three documents for a period of three or four months. Tr. 211.

34. ("Brown") had the impression that Mr. James Burtie, Chief of the AM Branch, didn't talk too favorably about sending the application, Form 301, in while the show cause order was pending. Tr. 211-12.

35. ("Brown") had been working on meeting all the requirements for Form 301 since 1990. Tr. 212-13.

36. ("Brown") asked for permission to do the things required they would work on it; specifically there was a delay in the wintertime due to weather which prevented them from pouring anchor bases for the tower when Mr. Frost came along before the end of the year of '91. When the show cause order came up they just stopped because they didn't know what to do. Tr. 215.

37. ("Brown") had the original permission to go silent. He didn't know that there was a limit on how long. He



assumed that everything was in order. He assumed that he didn't have any limit on the time he needed to have the changes made. The Commission had not put a limit on it. Any time he asked for an extension it was granted with no problem. If they placed a timetable on him and said WKIJ had to be back on the air within 30 days or 90 days ("Brown") could have. Tr. 217-18.

38. Furthermore ("Brown") was waiting until the AM freeze was lifted. ("Brown") understood that during the AM freeze he couldn't submit any applications for modifications of new stations. Tr. 218.

39. The freeze was not lifted until April 19, 1992. Tr. 219.

40. MMB 18 is the Commission's order placing the freeze on filing of the AM applications revealed that they would accept applications for minor changes necessitated by costs beyond the control of the applicants. Tr. 224.

41. ("Brown's") change was not a minor change due to the fact that they had to do a power increase which was a major change. Tr. 225.

42. ("Brown") would have to pay a \$2,000.00 fee with the change. Tr. 255.

43. The FCC ended the current freeze on filing applications for new AM construction permits and modifications of the existing facilities at midnight on April 19, 1992. Tr. 227. MMB Ex 19.

44. ("Brown") asked for a waived to file an application for the major change ("Brown") was granted permission to do the test, but was not granted permission for filing an application. Tr. 229.

CROSS

45. ("Brown") requested to go silent on June 24, 1990 until they were able to restructure their finances and or sell WKIJ. MMB Ex 1. Tr. 231.

46. ("Brown") with letter addressed to BROWN COMMUNICATIONS, RADIO STATION WKIJ (AM) % JIMMY D. BROWN, P. O. BOX 1332; JASPER, ALABAMA 35501 was granted temporary authority to remain silent thru 10-9-90 pending resolution of financial problems, and to allow time to locate a qualified buyer from FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D. C. 20554, signed by Mary C. McDonald Comms. Analyst. MMB Ex 2. Further, an assignment application was requested prior to October 9, 1990. ("Brown") overlooked the assignment application, however the time was extended. MMB Ex 2. Tr. 232.

47. ("Brown") requested an extension to remain silent on October 8, 1990. ("Brown") further stated their intentions to request authority to construct a test tower for the purpose of relocating the tower on their own property; to increase the power to 5kw and to waive the freeze on the AM band. ("Brown's") transmitter site land lease had expired and there would be no renewal of the contract. MMB Ex 3.

48. ("Brown") with letter addressed to BROWN

COMMUNICATIONS, RADIO STATION WKIJ(AM), % JIMMY BROWN, P. O. BOX 1332, JASPER, ALABAMA 35501 received authorization to extend the silent time to 1-21-91 on October 30, 1990 to locate a qualified buyer and relocate tower on their property from FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D. C. 20554 signed by Mary C. McDonald, Comms. Analyst. Further, ("Brown") was advised that FCC Form 301 must be filed for relocation of tower and increase of power. Also, ("Brown") was advised that any further request for extension must be accompanied by report of progress toward resumption of operation. MMB Ex 4.

49. ("Brown") with letter addressed to JIMMY D. BROWN, BROWN COMMUNICATIONS, RADIO STATION WKIJ(AM), P. O. BOX 1332, JASPER, ALABAMA 35501 received authorization to do field test on December 18, 1990 from FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D. C. 20554 signed by May Bradfield, Comms. Analyst. This authority expired February 28, 1992. Further, the results needed to be submitted to the office of the Analyst within 60 days of expiration of that authority. MMB Ex 5. Tr. 233.

50. ("Brown") filled a request for a 90 day extension to do more field strength measurements due to the rainy season on April 25, 1991. MMB Ex 6.

51. ("Brown") with letter addressed to JIMMY D. BROWN, BROWN COMMUNICATIONS, RADIO STATION WKIJ(AM), P. O. BOX 1332, JASPER, ALABAMA 33501 received authority for terms in letter dated December, 1990 to be extended through 8/31/91 from

FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D. C. 20554, signed by May Bradfield, Comms. Analyst. MMB 7.

52. ("Brown") requested an extension of time until the freeze is lifted and requested to be notified of any changes in letter dated August 16, 1991. MMB EX 8.

53. JIMMY D. BROWN, BROWN COMMUNICATIONS, RADIO STATION WKIJ(AM), ROUTE 10, BOX 351890, PITTSBURGH, PENNSYLVANIA 15251-5190 was sent a letter August 29 1991 stating that authority for special field test for radio station WKIJ (AM) will not be extended unless he submitted an acceptable status report outlining his progress. ("Brown") did not received letter dated August 29, 1991 from FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D. C. 20554, signed May Bradfield, Comms. Analyst. MMB EX. 9. Tr. 239.

54. ("Brown") assumed when he did not get a reply to his letter dated August 16, 1991 that due to the freeze the station was in compliance. Tr. 239.

55. ("Brown") thought that the station was silent with authority. Tr. 242.

56. If a station is silent for longer than 30 days a request for authority must be filed with the Commission. MMB Ex. 20.

### III. Conclusions of Law

57. The legal analysis of this case is best understood from the standpoint of three issues as follows:

I. Was ("Brown's") assumption that the station was silent with authority a legitimate assumption?

A. Was Commission Rule Sec 73.1740(a)4 regarding filing additional requests to remain silent vague and ambiguous?

B. Was the commission negligent in sending its notice of denial to its own address in Pennsylvania?

C. Was ("Brown") reasonable in assuming that he was successfully communicating with the commission when he was receiving all correspondence from the same address and all letters were signed by Comms. Analysts?

II. Did ("Brown") mitigate sufficiently?

III. What harm has been done?

RULE 73.1740(a)4 VAGUE AND AMBIGUOUS  
("BROWN") REASONABLE IN THINKING STATION  
SILENT WITH AUTHORITY

58. Between June 25, 1990 and the time ("Brown") first had actual notice that there was a problem with his silence status ("Brown") had been in continuous contact with FCC in his attempts to have his station authorized as being silent; relocated; and modified to increase his power. All responses to his communications were typed on the letterhead bearing the name Federal Communications Commission Washington, D. C. 20554 and signed by Comms. Analyst. All communications granted his requests. Considering the complexity of the FCC regulations ("Brown") was not unreasonable in his assumption the he was in compliance in all matters. ("Brown") made it clear in his letter of August 16, 1991, when he asked to be notified of any changes that he considered his actions to be encompassing all requirements. ("Brown") Ex. 1, 9.

59. ("Brown") did not realize he was not in compliance with 73.1740(a)4 because he had asked for an extension, and received no reply. He assumed that he would be granted the extension just as before. Furthermore, 73.1740 is an ambiguous statute because (a) 4 states that if a station can't resume operations within 30 days, informal written request must be made to the FCC... for additional time... MMB 20, 21. Tr. 243, 246, 248.

60. This provision is vague for two reasons. First, the only period of time mentioned in the Rule is 30 days.

("Brown") was allowed to stay silent for periods longer than 30 days.

61. Secondly, the regulation says that "informal written requests" should be made in order to extend the silent period. What constitutes informal written requests is unclear. ("Brown") had remained in contact both orally and written with the same office of the FCC (Comms Analyst.) throughout the entire time. No mention was made of a problem. Proposed Findings of Fact, 46, 48, 49, 51.

62. Due process requires that government regulations provide adequate warning as to what they require so that a reasonable person would not have to guess as to their meaning. Village of Hoffman Estates v. Flipside, 455 U.S. 489 (1982).

63. ("Brown") could have reasonably believed that since his silent periods were longer than the 30 days mentioned in the Rule that the FCC was dealing with him under special circumstances and he was therefore, not being held to the 30 day renewal regulation. Additionally, since ("Brown") had maintained verbal and written contact, where he asked to be informed of any changes, he could have reasonably assumed that these communications were considered "informal requests" to remain silent. Proposed Findings of Fact, 52, 54, 55.

64. Rule 73.1740 did not give ("Brown") fair warning as to what exactly was required of him to extend his silent status.

#### NEGLIGENCE BY COMMISSION

65. It was unfortunate that the letter advising him of a denial was sent an address in Pittsburgh, Pennsylvania. Proposed Findings of Fact, 53, 54.

66. A change of address filed by ("Brown") would not have prevented that particular error.

67. ("Brown") had not given the FCC an address in Pennsylvania. Clearly, the letter sent to ("Brown") at the FCC's office in Pennsylvania was a clerical error on the part of the FCC. Proposed Findings of Fact, 53.

68. The Commission revoked the license of a station whose silence status was unauthorized because the licensee had not presented facts which showed it attempted to mitigate its violations, and additionally because the licensee intentionally failed to contact the FCC once it became aware of his violation. Mega Broadcasting Corp., 5 FCC Red 5260.

69. ("Brown") is distinguished from Mega Broadcasting due to his method of dealing with the FCC both before and after he was notified of the denial of his silent status indicates that if he had received the letter that the FCC mistakenly sent to Pennsylvania, he would have responded and co-operated promptly to the situation. Proposed Findings of Fact, 11, 12, 13, 15, 32, 33, 34, 35, 36, 37.

70. As soon as ("Brown") did find out, through a third party, that there was a problem, unlike the licensee in Mega Broadcasting, he immediately contacted the FCC, willingly came forth with all information, and fully complied with all procedures and requests. Proposed Findings of Fact,



9.

71. In the matter of Radio Northwest Broadcasting Company 4 FCC Red 596, the Fcc revoked the license of a station that was silent without authorization because the licensee failed to file a written notice of appeal and answer the request for admission of facts.

72. ("Brown") is distinguished from Radio Northwest by his behavior in promptly filing his notice of appearance; his appearance in defending himself; his compliance with sending any papers requested of him; and his listing of steps taken to restore the station to operation. Proposed Findings of Fact, 8, 9.

73. ("Brown") is again distinguished from Mega Broadcasting in that he is interested in returning the station to the air as opposed to selling it. Proposed Findings of Fact, 25. ("Brown") EX 9.

74. ("Brown") has demonstrated that the reason he had the station go silent was when he lost his lease he desired a stronger signal for the station which would increase revenue. Proposed Findings of Fact, 20, 21, 22, 23, 24, 29.

("BROWN") PRESENTED FACTS WHICH MITIGATED HIS DAMAGES

75. ("Brown") in compliance with Mega Broadcasting has presented facts which mitigate his violations. Proposed

Finding of Fact, 9-56.

76. All of the above-mentioned actions of ("Brown"), his efforts to establish a station with greater power, immediately contacting the FCC when he found out there was a problem, coming forth with all information, complying with the procedural request, mitigate any harm ("Brown") may have caused by his error in not fulfilling the Commission's requirements. Proposed Finding of Fact, 9-56.

HARM CAUSED BY ("BROWN"'S) ACTIONS

77. If ("Brown's") omissions did cause any harm, the harm is likely to be minimal due to the fact that there was an AM station freeze at the time, and no new AM Construction permits and modifications of the existing facilities were being accepted. Proposed Finding of Fact, 43.

78. The loss of time, effort and expense ("Brown") would sustain if the license were to be revoked would far out-weigh any damage done by his non-compliance. Proposed Finding of Fact, 25.

WHEREFORE, Brown Communications respectfully submits that Brown was not in violation of sections 73.1740 and/or 73.1750 of the Commission's Rules and in light of the evidence adduced pursuant to the foregoing issue, Brown is qualified to be and remain the licensee of Station WKIJ(AM). In the alternative if Brown Communications is found to be in violation of sections 73.1740 and/or 73.1750 of the Commission's Rules that in light of the evidence adduced pursuant to the foregoing issue, Brown is qualified to be and

remain the licensee of Station WKIJ(AM).

Respectfully Submitted,

BROWN COMMUNICATIONS

By: Kathryn M. Swisher

KATHRYN M. SWISHER

Its Attorney

September 1, 1992

Law Offices of

Kathryn M. Swisher

Suite 777

699 S. Mendenhall Road

Memphis, Tn 38117

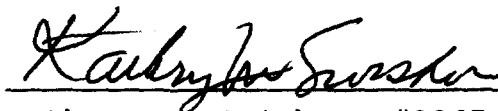
(901) 682-6320

CERTIFICATE OF SERVICE

I, Kathryn M. Swisher, do hereby certify that copies of the foregoing PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF BROWN COMMUNICATIONS have been served by United States Mail, postage prepaid this 1st day of September, 1992, upon the following:

Honorable Richard Sippel  
Administrative Law Judge  
2000 L. Street, N.W. Room 214  
Washington, D.C. 200554

Ms. Paulette Laden  
Attorney for Mass Media Bureau  
2025 M. St., Room 7212  
Washington, D.C. 20554

A handwritten signature in cursive script, reading "Kathryn M. Swisher", is written over a horizontal line.

Kathryn M. Swisher, #9267